

PART 3

LEGAL STUDIES

In this section three discussions of family law highlight some of the major themes which have held the attention of would-be law reformers, as well as laymen and researchers in Ghana for several decades. First the late Professor Bentsi Enchill looks at the conflict inherent between the traditional view of the *family* as a lineage segment, in which ones spouse belongs to a different *family* and the contemporary situation in which it is often man and wife who are thrown together to manage an urban household on their resources in money and time and to rear their dependent children. The point is clearly made that the customary law on many accounts denies the unity and individuation of the conjugal family. Professor Bentsi Enchill refers to the potential effects of such pressures upon conjugal and filial relationships—an important theme for research touched upon in several contributions to *Legon Family Research Papers No. 1*.

In chapter 8 Maxine Kumeakor examines some of the implications of the Matrimonial Causes Act 1971. She makes the point that virtually all marriages contracted between Ghanaians are first and foremost customary marriages. Whether or not the customary marriage rites are followed by church or Ordinance Marriage ceremonies appears to depend more upon the means and status of the partners than on any fundamental differences in attitudes or beliefs.

Finally Professor Woodman makes a further contribution to the perennial discussion of the reform of the law of inheritance.

CHAPTER 7

SOME IMPLICATIONS OF OUR LAWS OF MARRIAGE AND SUCCESSION

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The social organisation of many of our traditional societies is based on unilineal descent groups, that is, clans and lineages. And these groups constitute the basis of much of our customary law of succession.

Thus "family" in our current law is defined in strict unilineal, lineage terms, and succession to property and to office is mostly derived from membership of the lineage. A representative definition which summarises the core of our customary law of succession runs as follows: "The family is the group of persons lineally descended from a common ancestor exclusively through males (in communities called patrilineal for this reason), or exclusively through females starting from the mother of such ancestor (in communities called matrilineal for this reason), and within which group succession to office and to property is based on this relationship." (Bentsi-Enchill, 1964; 25).

Now the unilineal descent group is constituted on an explicitly partial basis, that is, on a basis which denies or ignores the fact that descent or filiation is bilateral. The mythical explanation which the Akans furnish for their change-over to a system of matrilineal descent testifies to this posture of explicit denial or ignoring of one side of the family tree. So that our rules of inheritance based on these unilineal descent groups are vitiated by this explicit rejection of the relevance of a whole half-segment of an individual's family tree. It is this rejection which explains the unsatisfactory provision for a man's children in matrilineal systems of succession, and for a man's widow or widows in both matrilineal and patrilineal systems.

As a consequence of the factors implicit in the foregoing, our traditional societies and legal systems (in most of Ghana, at least), effectually deny and substantially discourage any concept of the unity of the conjugal family. With us the wife is *not* a member of her husband's family and the husband is not a member of his wife's family. This is so in our matrilineal communities; and it would seem to be so in our patrilineal communities. It is certainly so among the Ewes. (Nukunya, 1974: passim; Kludze, 1974: passim). But it needs not have been so. In much the same way as slaves and strangers could be incorporated into a lineage or clan, our societies could have regarded wives as being incorporated into their spouses descent groups. But they do not. And by their refusal to regard spouses as incorporated into the descent groups of their mates, our social systems and our customary legal systems effectually deny, and operate to discourage, the evolutionary factors that generate the propensity to union in the conjugal family unit.

It is difficult enough for a man and wife to live and work together for a long time in peace and harmony. Our widespread system of unilineal descent groups into which the wife is not admissible piles additional divisive pressures on the married couple. If a wife does not become

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a member of her husband's lineage, then her husband's property must, in principle, be kept away from her and passed on to his descent group; his economic exertions must be pushed in a similar direction away from the wife. And the wife whose childbearing and housekeeping chores necessarily make her the weaker partner, is driven to seek security in her own endeavours and those of her descent group. It becomes patently unwise for her to sink in her lot with that of her husband. The respective descent groups will resent and work against any misdirection of property or endeavours in favour of the alien spouse. The common allegation that marriage, with us, is a union of families turns out to be intrinsically irrelevant when it comes to questions of succession to property.

In matrilineal communities, even the unifying common interest which children can bring to a married couple has to contend with the notion that the children do not belong to the father's family. But, as we might put it, who cares? The husband's family get the property and the wife's family get the children. In patrilineal communities the husband's family get the children and the children get the property. But the children can be trusted to look after their mothers, and in this the patrilineal system reveals one element of superiority. For it tends to reinforce the spouses common interest in their children.

A starkly instrumental and narrow view of marriage as an agency for childbearing is revealed. Marriage may be terminated if a wife is barren or a husband impotent. The wife in our system is essentially a gage or pledge; the bridewealth is the money advanced for her services, and is normally returned if her services are terminated. An adultery fee is payable to her husband if she is seduced but she has no such rights in her husband's person. In many communities she was traditionally treated worse than a concubine if she was divorced, for she was obliged to pay back not only the bridewealth but also gifts made to her by her husband and various expenses made on her behalf by him. Even upon the death of her husband and her refusal to accept the husband's successor or relation as husband, she was still normally required to return the bridewealth in order to obtain her release as a widow, free to remarry. The fact that she may have spent herself in bearing children and serving the household gains only grudging acknowledgement in the calculus of liabilities when divorce ensues. Could there be a more powerful incentive for women to go out to work?

The system of bridewealth payment gives the wife's family a vested interest in preserving an unhappy marriage, for the cynical reason of postponing the evil day when the bridewealth must be returned. A built-in temptation to ambivalence in the attitude of the woman's lineage to the marriage becomes discernible—a factor which may help to further depress the woman's meek role as wife.

The enforced ambiguities of children's attitudes (in matrilineal systems) to their father's lineage members would also merit study.

But the fundamental ambiguity or source of tension is the one I have drawn attention to—the systemic non-recognition of so natural and elemental a unit as the conjugal family unit. For this is a natural unit of co-operation designed to cater for the physical, mental and psychic needs of the long maturing *human* infant and for the complementary needs of the married couple.

And the question which arises is whether facts of this level of importance can be ignored or denied with impunity as our system of unilineal descent groups attempts to do. As we know, individuals who plunge themselves into fire out of sheer mistake or on the basis of some false

scientific theory regarding the nature of fire run a danger of self-destruction. What then of societies which organise and conduct themselves on the basis of erroneous scientific ideas and half-truths? May we not reasonably suspect that they run as much danger of frustration and self-destruction, even though the hazards to which they thus expose themselves may be complex and difficult to describe? My next proposition then is this: our systemic and ideological denial of the unity of the conjugal family is fraught with harmful consequences for our society.

At the level of the conjugal or nuclear family our society should be exerting pressures which reinforce the factors promoting co-operative economic endeavour fostering a sense of common purpose in the launching of the next generation, and assuring a wife that her efforts will not go unrewarded upon her husband's demise. Our system of unilineal descent groups work in the opposite direction, exerting divisive pressures. It leads to a narrow instrumental view of marriage that operates harshly on our womenfolk and maximises their sense of personal insecurity—a condition most unsatisfactory for the rearing of children.

Fourthly, I would state that our tolerance of polygyny is a good indication of the erroneously low estimate that our society places on the marriage institution. Correspondingly, the fact that polygyny is bigamy in the overwhelming majority of countries that is a crime, a sin, underlines the importance attached by them to the marriage institution and to the protection of the conjugal unit.

If the conjugal unit is of the elemental importance that the facts seem to suggest, then one measure of the adequacy or otherwise of a society's laws and institutions regarding marriage would be the degree to which they protect and assist this unit. And this consideration yields criteria for assessing a country's laws regarding marriage and succession. Against this background our society's tolerance of polygyny and our systemic exclusion of the widow from the inheritance become suspect. A minority view, or minority system, (such as our matriliney, polygyny and widow exclusion are) is not necessarily erroneous. But a minority system is under a challenge to demonstrate superior merit if it is to survive. And it is gravely questionable whether our tolerance of polygyny and our unilateral succession rules possess that superior merit.

Tolerance of polygyny, I would say, is predictable from our systems of unilineal descent that deny membership and succession rights to the wife or any number of wives. Such tolerance is also predictable from the narrow instrumental view of the wife indicated by our traditional system. No less predictable, I would suggest, is the essentially divisive force of jealousy and rivalry between wives that polygyny introduces into the conjugal unit, and its tendency to aggravate still further the insecurity of the wife and her need to seek a separate security. And I would add that we need studies of the effect of polygyny on children and on the psychology of the polygynous husband.

Note

While the foregoing statement summarises the fundamental logic of our customary law of succession, it deliberately omits reference to legislation and case law which can be said to have modified or developed the customary law. This for many reasons:

(a) Legislation such as the Marriage Ordinance and the Marriage of Mohammedans Ordinance has substantially affected only a tiny minority of the population, and its operation is significantly affected by the circumambient customary legal understandings and practices—a topic meriting special investigation.

(b) Other legislation such as the Education Act 1961, the Maintenance of Children Act 1965, the Wills Act, 1971 and the Matrimonial Proceedings Act of 1971 contain provisions which if enforced, would give some added protection to the conjugal unit under customary law and clarify and enforce its obligations to children. But they have yet to pass from the status of the law in the books to that of the law in the lives and action of the people.

(c) Development in the case law requiring a recognition of widow's and children's rights to maintenance and of the estate of a deceased matrilineal intestate are interesting and important in the indication they give of how the courts will handle such cases in future if brought before them, and as influences for change.

But for each one case that reaches the courts, thousands do not get breathed about, thousands are settled in accordance with traditional understandings before they reach court; and many of those that reach court are withdrawn for settlement or not prosecuted.

(d) Ghana has yet to take action that deals with the substance of the customary law practised by the overwhelming bulk of the people.

Bibliography

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| Bentsi Enchill K. | 1964 | <i>Ghana Land Law</i> London, Sweet & Maxwell |
| Kludze A. K. P. | 1974 | Family Property and Inheritance Among the Northern Ewe. Chapter 10 in <i>Legon Family Research Papers No. 1</i> . |
| Nukunya G. K. | 1974 | Some Bilateral Elements in Anlo Kinship Chapter 9 in <i>Legon Family Research Papers No. 1</i> (ed) C. Oppong. |



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